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 AVI STRUGO

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**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA**

**SAN FRANCISCO DIVISION**

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11 NANCY FLORES LESSLER and MARK D.  
 LESSLER,

12 Plaintiffs,  
 13  
 vs.  
 14 AVI STRUGO,  
 15  
 Defendant.

16 Case No.: C07-04409

17 DEFENDANT AVI STRUGO'S NOTICE  
 OF MOTION AND MOTION TO STRIKE  
 JURY DEMAND; MEMORANDUM OF  
 POINTS AND AUTHORITIES;  
 DECLARATION OF J. DOUGLAS  
 DURHAM IN SUPPORT THEREOF;  
 AND [PROPOSED] ORDER

18  
 DATE: May 6, 2008  
 TIME: 9:00 a.m.  
 PLACE: Crtrm E, 15<sup>th</sup> Flr

19 **TO ALL PARTIES AND TO THEIR RESPECTIVE ATTORNEYS OF RECORD:**

20 **PLEASE TAKE NOTICE** that on May 6, 2008, 9:00 a.m. in Courtroom E of the  
 21 United States District Court, Northern District of California, San Francisco Division, Defendant  
 22 AVI STRUGO ("Strugo") will, and hereby does, move this Court for an order striking  
 23 Plaintiffs' jury demand.

24 The Motion will be made on the further grounds that (1) in Strugo's Answer to the  
 25 original complaint he objected to the jury demand; (2) by agreement of the parties, Strugo's  
 26 original Answer is deemed to be his Answer to the Amended Complaint for Damages In  
 27 Admiralty; (3) the sole alleged basis for this Court's jurisdiction is admiralty; (4) Rule 38(e)  
 28 expressly provides that the Federal Rules of Civil Procedure are not to be construed to create a

1 right to trial by jury of issues in an admiralty claim; and (5) the authorities cited herein.

2 The Motion is based on this Notice, the attached Memorandum of Points and  
3 Authorities, the attached Declaration of J. Douglas Durham in support thereof, as well as all  
4 pleadings and records on file herein, evidence, and arguments that may be presented prior to, or  
5 at the time of, the hearing on the Motion, and all other matters of which the Court may take  
6 judicial notice. A Proposed Order is submitted herewith.

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8 DATED: March 5, 2008

BULLIVANT HOUSER BAILEY PC

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By   
J. Douglas Durham  
Lucas F. Olts  
Attorneys for Defendant,  
AVI STRUGO

1                   **STATEMENT OF ISSUE TO BE DECIDED**

2                   The issue to be decided is whether, as a matter of law, Plaintiffs are entitled to a jury  
3 trial of their admiralty action.

4                   **MEMORANDUM OF POINTS AND AUTHORITIES**

5                   **I. INTRODUCTION**

6                   This action involves claims for personal injury arising from an incident on the navigable  
7 waters of the United States. The Court's admiralty jurisdiction is the sole basis on which this  
8 Court has jurisdiction over this matter. Strugo does not challenge whether the action properly  
9 falls within that jurisdiction. There is no basis for federal question jurisdiction, no basis for  
10 diversity jurisdiction, and there is no claim under a federal statute conferring the right to a jury  
11 trial. These facts are determinative of the issue presented by this motion.

12                  Plaintiffs filed a jury demand with their original complaint, and demanded a trial by jury  
13 in their Amended Complaint ("AC"). Strugo objected to the jury demand in his Answer based  
14 on Federal Rule of Civil Procedure 38(e), which reads, in its entirety:

15                  **(e) Admiralty and Maritime Claims.** These rules shall not be  
16 construed to create a right a right to trial by jury of the issues in an  
admiralty or maritime claim within the meaning of Rule 9(h).

17                  The Joint Case Management Statement noted this dispute in at point 16. Defendant  
18 raised the issue at the Initial Case Management Conference on December 4, 2007. The Court's  
19 Civil Minutes of that conference and its December 10, 2007 Case Management and Pretrial  
20 Order both reflect the Court's order that Defendant file this motion by April 1, 2008, to be set  
21 for hearing no later than May 6, 2008, the date of the next Case Management Conference.

22                  The fact that this matter is brought solely under the Court's admiralty jurisdiction brings  
23 the suit squarely within the scope of rule 38(e). While Rule 38(a) preserves inviolate the right  
24 to trial by jury declared in the Seventh Amendment to the Constitution, subsection 38(e)  
25 preserves a long-standing exception to that right. The authorities discussed below compel the  
26 conclusions that Rule 38(e) controls the jury issue in this action, and compels the conclusion  
27 that the motion must be granted.

28                  ///

## **II. FACTUAL BACKGROUND**

Plaintiffs allege that Strugo is a United States Citizen “living” within the Northern District (AC par. 2) and that at all material times they “were living” within the Northern District (AC par. 3). Thus, this is an action between California residents, so there is no factual basis for diversity jurisdiction.

The Amended Complaint asserts claims for personal injury based on theories of negligence, negligent infliction of emotional distress, and loss of consortium. No claim is brought under any federal statute, and thus no basis exists for federal question jurisdiction.

Plaintiffs allege that they were cruising southbound in their private motorboat on the Napa River and that Strugo was operating his private cruiser in a northbound direction when the wake from his vessel caused their injuries. They do not allege a commercial vessel was involved, nor injury to a seaman in the course of his employment. Thus, there is no Jones Act claim (Merchant Marine Act of 1920, now codified at 46 U.S.C.App. § 688), or a claim under any other statute conferring a right to a jury trial.

### **III. ARGUMENT**

This Court’s jurisdiction is based solely on the allegation that the incident transpired on the navigable waters of the United States. Plaintiffs elected to bring their action as an one “for Damages in Admiralty,” alleging that it “is an admiralty and maritime case within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure” (AC par. 1). They allege no other basis for federal jurisdiction, nor do the alleged facts demonstrate one.

“There is no right to jury trial on the admiralty side of the federal court, except as provided by Congress or as required by the Supreme Court in the exercise of its supervisory power over admiralty proceedings.” 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §2315, at 116 (2d. ed. 1995); *Simko v. C & C Marine Maintenance Co.* 594 F.2d 960, 965 (3d Cir. 1979), *cert. Denied*, 444 U.S. 833.

#### A. Rules 9(h) and 38(e) and the Right to a Jury Trial

In *Alaska Barite Company v. Freighters Incorporated*, 54 F.R.D. 192 (N.D. Cal. 1972) this Court observed:

1 Rule 9(h) was added to the Federal Rules as part of the unification  
 2 of the admiralty and civil practices in 1966. The Advisory  
 3 Committee Note of 1966 to subdivision (h) stated that '[I]t is no  
 4 part of the purpose of unification to inject a right to jury trial into  
 5 those admiralty cases in which that right is not provided by  
 6 statute.' *Rule 9(h) ties into rule 38(e) where the admiralty  
 practice of trials before the court without a jury is preserved.* The  
 purpose of Rule 9(h) is to allow the moving party who could  
 either bring suit under admiralty or civil law to clearly elect which  
 form of proceeding he chooses. 54 F.R.D. 192 at 194. (Emphasis  
 added.)

7 In *Wilmington Trust, et. al. v. United States District Court for the District of Hawaii*,  
 8 934 F.2d 1026 (9<sup>th</sup> Cir. 1991), the Court of Appeals discusses the background and operation of  
 9 Rule 9(h) in the context of a district court's order striking the counter-plaintiff's jury demand.  
 10 That discussion, as set forth below, is instructive on the issue presented by this motion.

11 The basis for admiralty jurisdiction is set forth in 28  
 U.S.C. § 1333, which states:

12 The district courts shall have original jurisdiction,  
 13 exclusive of the courts of the States, of:

14 (1) Any civil case of admiralty or maritime jurisdiction,  
 saving to suitors in all cases all other remedies to which they are  
 otherwise entitled.

15 The "saving-to-suitors" clause establishes the right of a  
 16 party to choose whether to proceed within the court's admiralty  
 jurisdiction or general civil jurisdiction *when both admiralty and  
 non-admiralty federal jurisdiction exist. See e.g., Atlantic & Gulf  
 Stevedores, Inc. v. Ellerman Lines*, 369 U.S. 355, 359-60, 82 S.Ct.  
 780, 783-84, 7 L.Ed.2d 798 (1962). (Emphasis added)

17 Prior to the 1966 merger of law and admiralty, a plaintiff  
 18 exercised this option by filing a claim on the admiralty side or the  
 civil side of the federal court. *Id.* With the merger of law and  
 admiralty, the Federal Rules of Civil Procedure advisory  
 committee recognized the need for a mechanism to inform the  
 court of a claimant's election to proceed in admiralty on claims  
 cognizable both in admiralty and the court's general civil  
 jurisdiction. Consequently, the committee noted:

19 Many claims, however, are cognizable by the district  
 20 courts whether asserted in admiralty or in a civil action, *assuming  
 the existence of a nonmaritime ground of jurisdiction.* Thus at  
 21 present the pleader has power to determine procedural  
 consequences by the way in which he exercises the classic  
 privilege given by the saving-to-suitors clause (28 U.S.C. §1333)  
 or by equivalent statutory provisions. (Emphasis added.)

22 \*\*\*\*\*

23 One of the important procedural consequences is that in  
 24 the civil action either party may demand a jury trial, *while in the  
 25 suit in admiralty there is no right to jury trial except as provided  
 26 by statute.* 934 F.2d 1026 at 1028-29. (Emphasis added.)

1 Rule 38(a) states:

2       **(a) Right Preserved.** The right of trial by jury as declared by the  
 3       Seventh Amendment to the Constitution or as given by a statute of  
 4       the United States shall be preserved to the parties inviolate.

5       Rule 38(a) does not obtain, however, in cases brought in admiralty or general maritime  
 6       law because those claims were historically tried to the court without a jury. As explained by the  
 7       United States District Court for the Western District of Washington in *Hughes v. The Cape*  
 8       *Caution*, (Not Reported in F.Supp.2d), 2003 WL 21715869 (W.D. Wash.), 2003 A.M.C. 1150, a  
 9       decision granting plaintiff's motion to strike defendant's jury demand:

10      Defendants have no constitutional or common law right to  
 11      demand a jury. The Seventh Amendment preserves a party's right  
 12      to a jury trial as it existed at common law. *See U.S. Const.*  
 13      Amend. VII. "Since there was no common law right to a jury trial  
 14      in admiralty cases, the Seventh Amendment does not apply to  
 15      suits that invoke only a federal court's admiralty jurisdiction."  
*Craig v. Atl. Richfield Co.*, 19 F.3d 472, 475 (9<sup>th</sup> Cir. 1994) (citing  
*Waring v. Clarke*, 46 U.S. (5 How.) 441, 460 (1847)); *see also*,  
*Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 363  
 16      (1959) (Admiralty jurisdiction "was exercised according to the  
 17      historic procedure in admiralty, by a judge without a jury.");  
 18      Fed.R.Civ.P. 9 adv. Comm.. note ("[I]n admiralty[,] there is no  
 19      right to jury trial except as provided by statute.").

20      Thus, Rule 38(e) embodies the continuation of centuries of the common law of admiralty  
 21      jurisdiction by providing that the rules "... shall not be construed to create a right to trial by jury  
 22      of the issues in an admiralty or maritime claim within the meaning of Rule 9(h)."<sup>1</sup>

23      Many of the cases discussing the jury issue concern "mixed" claims involving both  
 24      admiralty and another jurisdictional basis, pendant claims, or admiralty and claims under  
 25      statutes that confer the right to a jury. In mixed actions, a right to trial by jury may arise.

26      This is a critical distinction because this matter is brought solely under this Court's  
 27      admiralty jurisdiction. This is not a mixed action; there is no election to be made, and no claims  
 28      are brought under any federal statute. Causes of action brought under general maritime law, as

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26      <sup>1</sup> Since admiralty is the sole jurisdictional basis for this action, plaintiffs' allegation that this "is an admiralty and maritime case  
 27      within the meaning of Rule 9(h) ..." is superfluous. "A pleader may thus designate a claim as an 'admiralty or maritime claim  
 28      within the meaning of Rule 9(h)' to inform the court that the pleader has elected to proceed within the court's admiralty  
 jurisdiction." *Wilmington Trust*, 934 F.2d at 1029. Since there is no other jurisdictional basis for the complaint, plaintiffs have  
 no election to make. See footnote 4 of the *Wilmington* decision, in which the court notes that because the counter-plaintiff's  
 action "... is a claim that can be brought only within the court's admiralty jurisdiction, a 9(h) designation was not necessary to  
 apprise the district court that [counter-plaintiff] had elected to proceed in admiralty."

1 are plaintiffs', do not present federal questions within the meaning of 28 U.S.C. § 1331.  
2 *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 368. Since the sole basis for this  
3 Court's jurisdiction is admiralty, Rule 38(e), and centuries of precedent, preclude a jury trial.

4 **IV. CONCLUSION**

5 Admiralty is the sole basis for the Court's jurisdiction in this matter. Therefore,  
6 plaintiffs are not entitled to a jury trial. Defendant objected to the jury demand in his Answer to  
7 both the original and amended complaints (*See*, Declaration of J. Douglas Durham submitted  
8 herewith) and apprised the Court of that objection in the Joint Case Management Statement  
9 served and filed on November 19, 2007. Defendant has not waived his objection to the jury  
10 demand.

11 The relevant facts and law establish that Plaintiffs are not entitled to a trial by jury.  
12 Therefore, defendant respectfully requests that the Court strike the jury demand.

13 Defendant further requests that at the May 6, 2008 Case Management Conference the  
14 Court modify the Case Management and Pretrial Order with respect to all provisions relating to  
15 a jury trial, jury instructions, and verdict form, and substitute such provisions as the Court  
16 deems appropriate for a bench trial.

17  
18 DATED: March 5, 2008

BULLIVANT HOUSER BAILEY PC

19  
20 By   
21 J. Douglas Durham  
Lucas F. Olts  
22 Attorneys for Defendant,  
AVI STRUGO  
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1                   **DECLARATION OF J. DOUGLAS DURHAM**

2                   I, J. Douglas Durham, do declare and state as follows:

3                   1.       I am an attorney with the law firm of Bullivant Houser Bailey PC, attorneys of  
4 record for Defendant Avi Strugo in the above-captioned action. I am duly licensed to practice  
5 law in all the Courts of the State of California and Illinois, and a member in good standing of  
6 the California and Illinois bars. I have personal knowledge of the facts stated herein and if  
7 called upon to testify thereto, I could and would do so competently.

8                   2.       At the December 4, 2007 Case Management Conference, I raised with opposing  
9 counsel the question of whether plaintiffs would agree that defendant's previously filed Answer  
10 to the complaint would stand as defendant's Answer to any Amended Complaint plaintiffs  
11 might file. Counsel agreed to do so.

12                  3.       On January 4, 2008, I received notice of the filing of Plaintiffs' Amended  
13 Complaint. In an e-mail exchange with attorney Sam Bristol on that same date I asked that he  
14 confirm the agreement reached at the CMC. Mr. Bristol responded by e-mail with the  
15 statement: "We did agree to that at the CMC; you can consider this our confirmation that the  
16 presently filed Answer is deemed to apply to the amended complaint."

17                  I declare under penalty of perjury, under the laws of the State of California, that the  
18 foregoing is true and correct.

19                  EXECUTED on this 5<sup>th</sup> day of March, 2008, at Sacramento, California.

20                    
21                  J. DOUGLAS DURHAM

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**PROOF OF SERVICE****STATE OF CALIFORNIA, COUNTY OF SACRAMENTO**

3 **Nancy Flores Lesser, et al. v. Avi Strugo;**  
 4 **USDC, Northern District, San Francisco Division, Case No. 2:05-C07-04409**

5 I am a citizen of the United States and am employed in Sacramento County, where this mailing  
 6 occurs. My business address is 1415 L Street, Suite 1000, Sacramento, California 95814. I am over the  
 7 age of 18 years and not a party to the within cause.

8 On March 5, 2008, following ordinary business practice, I served the foregoing document(s)  
 9 described as:

- 10 • **DEFENDANT AVI STRUGO'S NOTICE OF MOTION AND MOTION TO**  
**STRIKE JURY DEMAND; MEMORANDUM OF POINTS AND AUTHORITIES;**  
**DECLARATION OF J. DOUGLAS DURHAM; [PROPOSED] ORDER**

11 in the following manner, by placing a true copy/true copies thereof in a sealed envelope/sealed  
 envelopes, addressed as follows:

12 Thomas E. Fraysse  
 13 Samuel J. Bristol  
 14 Knox Ricksen LLP  
 15 1300 Clay Street, Suite 500  
 Oakland, CA 94612-1427  
 Tel: (510) 285-2500  
 Fax: (510) 285-3505  
 [Attorneys for Plaintiffs Nancy Flores Lesser  
 and Mark D. Lesser]

16 Steven B. Stein  
 17 Levin Simes Kaiser & Gornick  
 18 44 Montgomery Street, 36<sup>th</sup> Floor  
 San Francisco, CA 94104  
 Tel: (415) 646-7171  
 Fax: (415) 981-1095  
 [Co-Counsel for Plaintiffs Nancy Flores Lesser  
 and Mark D. Lesser]

19 — (BY MAIL) I caused such envelope(s) with First Class postage thereon fully prepaid to be  
 placed in the U.S. Mail in Sacramento, California. I am readily familiar with my employer's  
 20 normal business practice for collection and processing of correspondence and other material for  
 mailing with the United States Postal Service, and that practice is that said material is deposited  
 21 with the United States Postal Service the same day as the day of collection in the ordinary course  
 of business.

22 — (BY PERSONAL SERVICE) I caused such envelope(s) to be hand-delivered by an authorized  
 attorney messenger service, this date to the offices of the addressee(s).

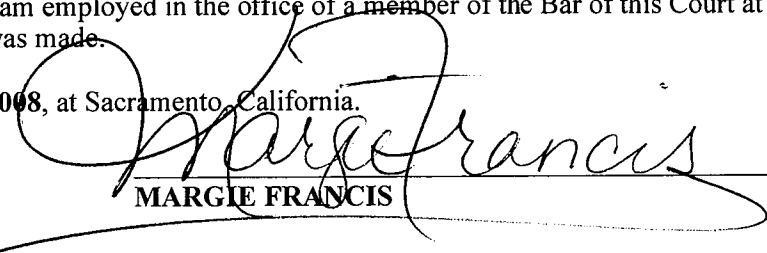
23 — (BY FEDERAL EXPRESS) I caused such envelope(s) to be delivered in a sealed Federal  
 Express package, delivery fees for which are billed to this firm's account, to a Federal Express  
 24 office for next-morning delivery. I am readily familiar with the business practices of my  
 employer for the collection and processing of correspondence for mailing with Federal Express  
 delivery service.

25 — (BY FACSIMILE) I personally transmitted the aforementioned document, via facsimile  
 machine, to each of the above listed parties' FAX numbers between the hours of 9:00 a.m. and  
 26 5:00 p.m. on \_\_\_\_\_ and received verification thereafter of each complete transmission.

27 **XXX (BY EMAIL – ESERVICE)** I caused to be served upon each party either via (1) their above  
 28 email address; (2) through Lexis-Nexis Serve and File, or (3) through the court's electronic court  
 filing system.

[ X ] **(FEDERAL)** I declare that I am employed in the office of a member of the Bar of this Court at  
 whose direction the service was made.

EXECUTED on March 5, 2008, at Sacramento, California.



MARGIE FRANCIS